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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 698

DANIEL F. BOONE,

Petitioner,

vs.

CLARENCE M. LIGHTNER, THEODORE A. LIGHTNER, MRS. ALICE LIGHTNER HOPF, MRS. MARTHA LIGHTNER BOONE AND MARTHA PENELOPE BOONE, A MINOR REPRESENTED IN THIS PROCEEDING BY HER NEXT FRIEND, W. C. HAGUE.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

M. R. McCOWN,
Counsel for Respondents.

J. E. SHIPMAN,
Of Counsel.

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The respondents respectfully submit to your honorable court the following brief in opposition to the petition for a writ of certiorari:

Statement of Matter Involved.

This action was commenced by the respondents against the petitioner in the Superior Court of Polk County, North

Carolina, by a summons duly issued June 21, 1941, and personally served upon the petitioner on June 23, 1941 (R. 1-2).

In their complaint the respondents sought an accounting and declaration of the terms of the trust fund referred to therein and expressed apprehension of the safety of the fund and sought the oversight of the court to safeguard and protect the rights of the minor beneficiary (R. 3-8). The petitioner in apt time answered admitting the receipt of the fund and promising when he "has a little time" to have a statement made up disclosing the status of the fund, and further alleged that he changed his residence from the State of North Carolina to Washington, D. C., on June 23, 1941, the day service was made on him, and that the North Carolina court did not have jurisdiction of the trust (R. 24-36). The petitioner in his answer alleged a purported declaration of trust executed by Clarence A. Lightner, and took the position that under said declaration he was not accountable to the court for the manner in which he discharged the trust.

The respondents replied to this further defense set up in the answer and alleged that at the time said paper writing was purported to have been executed, the said Clarence A. Lightner was without mental capacity to execute the same (R. 36-38).

The deposition of the petitioner on his own behalf was taken in Washington, D. C., at his instance, on August 15, 1941, at which time he was represented by Clifford M. Toohy, Esq., of Detroit, Michigan (R. 52). On November 3, 1941, the deposition of David S. Patterson was taken in New York on behalf of the respondents, and the petitioner attended in person and was represented by counsel (R. 52-53).

On November 5, 1941, certain depositions were taken in New York on behalf of the petitioner, and in addition to local

counsel representing the petitioner Mr. Toohy was also present, as was the petitioner (R. 53-54).

The cause regularly came on for trial at the January-February, 1942 term of Polk County Superior Court, and the petitioner moved for a continuance under the provisions of the Soldiers' and Sailors' Civil Relief Act. His attorney, Major Roy L. Deal, who made and argued the motion for the continuance, then stated to the court: "That he expected to be called in the service in the United States Army, and that he would be unable to try the case", and requested that the case be continued until May 25, 1942, in order to give the defendant ample time to employ other counsel (R. 40-41). An order was made granting the motion and transferring the cause from Polk County Superior Court to Henderson County Superior Court, and peremptorily setting the case for trial on May 25, 1942, and a copy of this order was certified to the Adjutant General of the United States Army (R. 49-50). When the matter was reached in accordance with this order in Henderson County Superior Court on May 25, 1942, a further motion for a continuance was filed in petitioner's behalf based on the Soldiers' and Sailors' Civil Relief Act, which motion was supported by the affidavits of petition (R. 55), and of Major Roy L. Deal (R. 58-59). In opposition to this motion, the respondents presented to the court the entire record consisting of the pleadings, the depositions which had been taken on behalf of both the petitioner and respondents, and the statement of receipts and disbursements filed that day by counsel then appearing for the petitioner (R. 51-55). They further called the court's attention to the provision in the order made by the court at the January-February, 1942, term of Polk County Superior Court requiring the Clerk of the Court to certify a copy of that order to the Adjutant General of the United States Army "who shall, if he deems it necessary, submit it to such of his subordinates or

superiors of the said Captain Boone as he may deem proper" (R. 50), and we particularly direct the court's attention to the absence of any statement in the petitioner's affidavit that he endeavored to procure a leave of absence and failed to obtain one. The motion for continuance was denied and the findings and opinion of the trial judge are set forth in the order (R. 59), and judgment (R. 39). The court found as a fact "that the Honorable Roy L. Deal at the January-February Term, of the Superior Court of North Carolina, in Polk County, in open court, requested that the action be not set until this date, stating at said time that he, the said Judge Deal was expecting to be called into the military service immediately, and that it therefore would be necessary for the defendant to procure additional legal counsel" (R. 59-60). The court further found as a fact "that the defendant has had ample time and opportunity to properly prepare his defense in this case, and that his military service has not prevented him from doing this" (R. 41).

After fully considering the affidavits for the motion, and the record in opposition, and after argument by counsel representing all parties, the court expressed the opinion and found as a fact "that the defendant in this cause is deliberately and wilfully attempting to evade an ultimate determination of the issues involved in the litigation" (R. 59).

Counsel then representing the petitioner withdrew, and the trial proceeded in the absence of the defendant and of any counsel representing the defendant (R. 61), and after issues were submitted to the jury and answered as shown, the judgment was entered (R. 39). The firm of Williams and Cocke, of which firm Mr. R. R. Williams is a member, and who appeared and argued the motion for a continuance, appeared and entered an appeal for the petitioner to the Supreme Court of North Carolina. In due course the Supreme Court

of North Carolina rendered an affirming opinion (R. 199-204).

Questions Presented.

1. Where the petitioner failed to raise in the Supreme Court of North Carolina, by exception duly taken, the question that there was no evidence to support the trial court's finding of facts upon which the order denying petitioner's motion for a continuance was based, can said question be raised for the first time by application for writ of certiorari in the Supreme Court of the United States?

2. Under the provisions of the Soldiers' and Sailors' Civil Relief Act, and under the facts shown by the record, is the question of continuance discretionary with the trial court?

Reasons for the Disallowance of the Writ.

It is respectfully submitted that the petition for a writ of certiorari should be denied for the following reasons:

1. For that there is no merit in the position of the petitioner that there was no evidence to support the court's finding of facts upon which the order denying the continuance was based, and for the further reason that the exception made thereto comes too late.

2. For that the trial judge was presented with a discretionary motion when petitioner applied for a continuance under the Soldiers' and Sailors' Civil Relief Act, and the facts fully justify and support the conclusion and action of the trial judge.

Argument.

POINT 1.

The record discloses that the respondent in his appeal to the Supreme Court of North Carolina made no point to the

effect that there was no evidence to support the findings of the trial court upon which the order denying the motion for a continuance was based, and no exception on this question appears in the record. It is elementary that the Supreme Court of North Carolina cannot grant relief to an appellant on the ground that there was no evidence, unless objection is made and exception taken in apt time in the trial court. As no objection was made or exception taken in this regard in the trial court, this question could not be reviewed or passed upon by the State Supreme Court, even if the petitioner had presented the same by argument or brief. However, it appears that the question was not presented in any manner whatsoever to the Supreme Court of North Carolina, and we submit that it is now too late for the petitioner to present it to this court. Furthermore, we think the record discloses full and ample evidence to support the finding of facts of the court below, and if the point now presented had been raised in proper time, it could not have been sustained. The petitioner based his motion for a continuance principally upon his own affidavit, and the conduct of the petitioner with respect to this case from the time of its institution until the trial was concluded in the Supreme Court of North Carolina, was such that the court could not give credence to his affidavit. Under the law the court was the sole judge of the weight to be given the affidavit of the petitioner, as well as any other affidavits that he may have introduced, and it is clearly apparent from the record that the affidavits offered by the petitioner were not convincing, and the petitioner's motion was therefore denied.

Penland v. *Hospital*, 199 N. C. 314;

Lane v. *Paschall*, 199 N. C. 364;

Tyson v. *Tyson*, 100 N. C. 360, at bottom of page 368;

Ferrell v. *Metropolitan Life Insurance Company*, 208 N. C. 420;

Harrison v. *Metropolitan Life Insurance Company*, 207 N. C. 487;
Lawrence v. *Hester*, 93 N. C. 79.

POINT 2.

The allowance of petitioner's motion for a continuance under the provisions of the Soldiers' and Sailors' Civil Relief Act was discretionary with the trial judge.

It is respectfully submitted that the preceding paragraph is a correct statement of the law. In petitioner's argument (page 17) it is said that the issue is joined on the proper construction of the words:

> "Unless in the opinion of the court, the ability of * * * the defendant to conduct his defense is not materially affected by reason of his military service."

The respondents agree that the pivotal point is involved in the language quoted. It is respectfully submitted that the trial court had ample facts presented in opposition to the motion to support his findings and that the findings were ample, and in fact that no other conclusion could have been reached. The petitioner further says in his brief that this court should read the record in order to determine whether there was evidence to sustain a finding by the trial court that the ability of the petitioner to conduct his defense was not materially affected by his military service. We respectfully submit that the facts set forth in the record, as referred to above, fully sustain the finding of facts by the trial court.

The respondents contend that the defendant had ample time and opportunity from June 23, 1941, when the service was made upon him, to prepare and present a defense, if he had one. It is clear from the record that he employed a number of able attorneys to represent him, and when he filed his report, he set forth eight items therein aggregating

$1042.73 representing payments made by the petitioner in *preparing* his defense in this action. It is most significant, we submit, that the petitioner, who is also an attorney, and admitted to practice before this court, should make an affidavit in support of a motion for a continuance without setting forth therein the important fact that he had applied for a leave of absence, and that his application had been denied. In the order of the trial court made at the January-February term, 1942, of Polk County Superior Court, the trial judge was painstaking and careful enough to have the Adjutant General of the United States Army notified officially and furnished a copy of the order showing that the case would be tried on May 25, 1942. In view of this official notification, the petitioner should have felt that a leave of absence would be granted, if requested, and if he had applied for such leave of absence and the same had been denied, it may be conclusively inferred that he would have so stated in his affidavit and that he would have supported said affidavit with the affidavit of a superior officer to the effect that his application for a leave of absence had been refused. The record discloses that the defendant attended the taking of depositions in New York on November 3rd, and November 5th, 1941, and he evidently obtained a leave of absence for this purpose.

In addition to the time which had elapsed from the commencement of the case to the date of the trial, and the nature of the charges made against the petitioner, and the omission from his affidavit of a statement showing an effort to obtain a leave of absence, the trial court also had the benefit of facts which were altogether convincing and conclusive that the petitioner had not made any effort whatsoever to be present at the trial, and that his reason for not being present was because of his dereliction of duty in discharging the trust involved in the litigation. On page 69 of the Record, the deposit of the trust fund amounting

to $15,449.10 is shown. The checks showing the withdrawals from this account by the petitioner to the order of his brokers (R. 135-13[illegible]) correspond with the debits to the bank account and the credits on the broker's account. The exhibits attached to the deposition of David S. Patterson fully disclose the petitioner's speculations with the trust fund (R. 83-115). The oath of the petitioner in verifying his answer "that he has handled this fund as a reasonably prudent man would have handled it; that he has used his best judgment and good faith in this matter; that he has not dissipated one penny of the fund, nor has he made any withdrawals from the fund since the day the money was turned over to him" (R. 31), and his statement of receipts and disbursements (R. 51-55) are in such conflict with the record of the bank account and of the broker, that no further comment should be necessary. We therefore submit that the conduct of the petitioner in this case is altogether inconsistent with the conduct of a defendant who is interested in the preparation of his defense, and in the trial of his cause. If he had had confidence in his defense and had been interested in sustaining it, he would not only have shown by conclusive evidence that he could not obtain a leave of absence from the proper authorities, but he would have used every effort to be ready, regardless of whether or not he could be personally present. He knew that Major Deal would not be in position to try the case, and he therefore had ample opportunity between February 2nd, and May 25th, to have employed counsel to ably represent him. He had his own deposition and the deposition of other parties upon which he relied to rebut the evidence of the plaintiffs, here the respondents, and we submit that if he had acted in good faith and believed in his defense, he would have been ready to have tried the case and would have had able lawyers employed to represent him. He

chose, however, to employ a firm of attorneys of Asheville, North Carolina, which is a firm of recognized ability, to represent him only for the purpose of obtaining a continuance, and then when his motion was denied, these attorneys withdrew from the case, but after the case had been tried and the judgment signed, the same attorneys appeared before the court and prayed an appeal to the Supreme Court of North Carolina. It is therefore clearly apparent that the petitioner did not want to try the case, and was seeking a continuance for the purpose of delay only, and that his conduct and attitude shows clearly that in his attempt to obtain a continuance he was merely trifling with the court.

There can be no question that if the petitioner had been acting in good faith that the attorneys who made the motion for the continuance and prayed the appeal would have been employed to stay with the case throughout the trial. Having no confidence in his defense, however, he pursued the tactics shown by the record with the hope that he would be granted relief under the Soldiers' and Sailors' Civil Relief Act.

We respectfully submit that the provisions of the Act were designed to prevent such abuse and that for this reason the court is vested with a sound discretion by the terms of the act. While the Act is intended to protect the rights of those in military service, it should be observed that the rights of creditors have not been overlooked. The provisions were intended to be fair and evenly balanced. It declares no general moratorium on debts and places no hindrance in the way of the commencement of actions against men in the military service. It provides no exemptions from the service of process. These are not the methods of relief provided, but the relief consists in suspending proceedings once they are begun. *But as a condition precedent to any action by the court, it must be made*

to appear that the ability of the soldier to discharge his obligations has been materially affected by reason of his military service. If, in the opinion of the court, the ability of the defendant to conduct his defense, if he is in the military service, is materially affected by such service, the Court is required to grant a stay of proceedings. In support of this position we cite the following:

In 130 A. L. R. 774, is an annotation of the Soldiers' and Sailors' Civil Relief Act, and on page 784, it is said:

> "The application of the remedies which the Soldiers' and Sailors' Civil Relief Act affords is left largely to the discretion of the trial court, and in the absence of a showing of an abuse of such discretion, the decision of such courts will not be disturbed."

See also *Swiderski* v. *Moodenbaugh,* 45 Fed. Supplement, 790, where Honorable James Alger Fee, said:

> "The statute indicates that the discretion of the trial Court is absolute and without review."

The opinion of the Supreme Court of North Carolina in this case was written by Stacy, Chief Justice, and filed November 4, 1942, and is reported in Volume 222, page 205, of the North Carolina Supreme Court reports. Prior to what is stated therein with respect to the act in question, the Chief Justice made the following observation pertaining to the duties of courts of equity to safeguard trust funds and particularly those of minors, viz:

> "When the trial court was last called upon to stay proceedings herein under the Soldiers' and Sailors' Civil Relief Act of 1940, he was faced with defendant's report, filed that day with the Clerk of the Superior Court of Henderson County, showing the trust account to be in a precarious condition. Eight items therein, aggregating $1042.73, represented payments made by the defendant in preparing his defense in this action.

Moreover the admission in defendant's answer that he was 'not managing said fund pursuant to any directions in the will of Frances M. Lightner', and the allegation that he was proceeding under ante mortem instructions from Clarence A. Lightner, which the plaintiffs challenged because of alleged incapacity of the maker, were sufficient to put the court on notice and inquiry respecting the status of the fund in suit. The court observed: 'From (fol. 202) the depositions giving the records of his bank account and the ledger sheets showing his speculations with the trust funds, it appears that the defendant did not have a defense'. It is the duty of a court of equity to care for trust funds, especially where the rights of minors are involved. Carter *v.* Young, 193 N. C. 678, 137 S. E. 875. As said by Merrimon, J., in Albright *v.* Albright, 91 N. C. 220, 'However large may be the powers with which the trustee is invested, they are all to be exercised only for the purpose of effectuating the trust; and when it appears that such powers are perverted to the detriment of the cestui que trust, the court will promptly interpose its protective authority.' See Young *v.* Hood, 209 N. C. 801, 184 S. E. 823; Heyer *v.* Bulluck, 210 N. C. 321, 186 S. E. 356, and cases there cited."

The court then after quoting Sections 201 and 200 of the Soldiers' and Sailors' Civil Relief Act of 1940, wrote a very brief opinion, which we quote in full in so far as it relates to the Act in question, and which we are persuaded states the proper interpretation and construction of the Act.

"It was the opinion of the trial court that the ability of the defendant to conduct his defense was not materially affected by reason of his military service. The judgment recites a factual finding 'that the defendant has had ample time and opportunity properly to prepare his defense in this case and that his military service has not prevented him from doing this. • • • His failure properly to handle the (fol. 203) trust fund or to account for the same has not been

affected in any way by reason of his military service'. Indeed, the trial court was strongly convinced of the necessity of prompt action on the part of the court of equity to protect the fund in suit. He permitted the defendant to use the Act of Congress as a shield, and declined to permit him to use it as a sword. In this, we think, the trial court pursued the intent of the statute. Pope *v.* U. S. Fidelity & Guaranty Co., 20 S. E. (2d) (Ga. App.) 618; Jamaica Sav. Bank *v.* Bryan, 175 Misc. 978, 25 N.Y.S. (2d) 17; Annotation, Soldiers' and Sailors' Civil Relief Acts, 130 A. L. R. 774.

Speaking to a similar situation in the Pope Case, supra, Sutton, J., delivering the opinion of the Court, said: 'So, it will be seen that a person in the military service is not entitled to a stay of a judgment against him as a matter of law under the provisions of the act of Congress just referred to, where in the opinion of the court passing on the matter the ability of such person to comply with the judgment is not materially affected by reason of his military service; nor is such person entitled to a stay of a proceeding against him, merely by virtue of said act, unless, in the opinion of the court passing on the question, his ability to conduct his defense is materially affected by reason of his military service.'

To like effect is the declaration of the Circuit Court of Appeals, Sixth Circuit, in the case of Royster *v.* Lederle, 128 F. (2d) 197: 'The object of the Act was to prevent injury to the civil rights of those in the armed services of the United States during that service in order that they would be free to devote all of their energies to the military needs of the Nation. Unless it is made to appear that the rights of the person in the service will be prejudiced by a proceeding against him, the Act is inapplicable.' See, also, Swiderski *v.* Moodenbaugh, 45 F. Sup. 790.

Nor was it error for the court to proceed without appointing an attorney to represent the defendant. Such is the requirement only 'if there shall be a default of any appearance by the defendant'. Here, there was no default of any appearance by the defend-

ant. He had duly filed answer. Depositions had been taken. His counsel appeared at the January-February Term, 1942, and moved for a continuance. This was granted, apparently upon satisfactory (fol. 204) terms. The defendant again appeared through counsel at the May-June Term, 1942, and moved for a continuance. It is true, counsel then announced that he appeared 'for the sole purpose of moving for a continuance'. Nevertheless, the appearance was general, and the court was presented with a discretionary matter."

Summary and Conclusion.

It is respectfully submitted that the facts as set forth in the record clearly show that this case has been correctly decided, and that the conclusion of the trial court as approved and affirmed by the Supreme Court is without error.

Respectfully submitted,

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